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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BERNIE LAZAR HOFFMAN aka TONY ALAMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 10, 2011

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QUESTION PRESENTED

Under the Mann Act, is any travel across a state line by either party to an unlawful sexual relationship with a minor, without regard to when sex occurred after travel across a state line, sufficient to convict under the Commerce Clause and *Mortensen v. United States* without proof of a "dominant purpose" of the travel?

RULE 29.6 STATEMENT

There are no corporations party to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Bernie LaZar Hoffman, aka Tony Alamo, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported as *United States v. Hoffman,* 626 F.3d 993 (8th Cir. December 2, 2010). (App. 1-13) The Court of Appeals denied rehearing and rehearing en banc on February 9, 2011. (App. 14)

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was rendered December 2, 2010. (App. 1) Petitioner's timely petition for rehearing was denied February 9, 2011. (App. 14)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, art. I, § 8, cl. 3 provides that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, ..."

18 U.S.C. § 2423(a) provides:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned. . . .[1]

STATEMENT

1. This case results from a ten-count Mann Act, 18 U.S.C. § 2423, indictment involving alleged unlawful sex with five minor girls, Jane Does 1-5, alleged to have occurred from 1994-2005.

Petitioner is known as Tony Alamo, and he is legally blind and a minister and founder of the Tony Alamo Christian Ministries (TACM). TACM had churches in Arkansas, California, Tennessee, and

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[1] The statutory maximums changed between 1994 and 2005, the dates in the indictment.

New Jersey. Petitioner's ministry is headquartered in Fouke, Arkansas. It included an accredited school and a church complex on which many families lived in service to the church. For those who dedicated their lives to the ministry, the church provided housing, food, medical care, and education for their families.

Petitioner always had a staff assisting him to drive him and to prepare his radio broadcasts and the writing of his literature about the Bible. The church also maintained a website with extensive recordings and writings of Alamo.

The government contended that petitioner made the Jane Does his "child brides" and had sex with them, and it used interstate trips to make a Mann Act case.

Petitioner was indicted in 2008, and he was tried in the Western District of Arkansas, Texarkana Division in July 2009. His defense was general denial. Even so, he contended throughout that the sex acts alleged by the government were incidental to any interstate travel, and, thus, no violation of the Mann Act was possible because interstate commerce was constitutionally required to be a dominant purpose of the travel, and it was absent.[2]

Indeed, in some of the counts, fully crediting the government's case, no sex occurred outside of Arkansas; at the worst, travel was less than incidental to the

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[2] Petitioner's Opening Brief in Court of Appeals at 32.

sex, let alone a "dominant purpose" as required by Eighth Circuit precedent.[3]

2. The ten counts are summarized as follows:

Count 1 – Jane Doe #1, 2004, 30 year sentence: Petitioner traveled on the church bus from Fouke, Arkansas to the California church on church business, and Jane Doe #1 asked to go on the trip. She was not invited, but petitioner agreed she could go. She testified that she had sex with petitioner on the bus going to and in California. After a while in California, petitioner and Jane Doe #1 came back to Arkansas on church business in separate vehicles.

Count 2 – Jane Doe #1, 2005, 30 year sentence: She was in Colorado with her family, and she testified that petitioner asked her to come back to the church. She traveled first to California and then to Arkansas without petitioner. She could not even remember whether sex occurred outside of Arkansas, but, when she did have sex with petitioner, it was sporadic.

Count 3 – Jane Doe #2, 2000, 15 year sentence; *Count 4 – Jane Doe #2, 2001, 15 year sentence*: While she lived at the church property, her parents lived in Moffett, Oklahoma.[4] She traveled twice with her parents back to Moffett, and then returned to the church. Petitioner did not even go on these trips or

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[3] *United States v. Cole*, 262 F.3d 704, 709 (8th Cir. 2001).

[4] Moffett, Oklahoma is near Ft. Smith, Arkansas, and it is 201 miles from Fouke.

leave Arkansas, so he could not have had sex with her during interstate travel. The government contended that he called her and asked her to return and sex resumed after she got back, thereby satisfying the interstate commerce requirement.

This trip and others produced a jury note on the first day of deliberations that showed the jury's confusion. As paraphrased by the District Court: "the last question that this jury asked was did Tony have to have sexual conduct interstate, or out of state, to be charged? It happened in Fouke, Arkansas before the trip and after he returned."[5]

Count 5 – Jane Doe #3, 1998, 10 year sentence: Her parents also lived in Oklahoma, and she traveled to visit her parents in Oklahoma, according to the government, to assuage her father's worries about living at TACM. The record does not show that they had sex before her trip to Oklahoma and back.

Count 6 – Jane Doe #3, 1999, 15 year sentence: Petitioner took a church bus business trip to Nashville about church property, and she went along. No sex occurred on that trip, and this too was like the subject of the jury's note.

Count 7 – Jane Doe #4, 1994, 10 year sentence: This occurrence was a church motor home trip from Fouke to Los Angeles for a legal matter. By the time

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[5] T. 1678:7-10, discussed in Petitioner's Court of Appeals brief at 26.

they got to Albuquerque, they found out the purpose of the trip became moot, so they turned around and came back to Fouke. No sex occurred on this trip.

Count 8 – Jane Doe #4, 1994, 10 year sentence: This occurrence was a church motor home trip to West Virginia to attend to a deposition in a legal matter, and she went along on the trip. There was no sex on the trip, just allegedly before and after.

Count 9 – Jane Doe #4, 1994, 10 year sentence: Petitioner was tried in 1994 for tax evasion in Memphis.[6] She and several church members went by motor home first to Nashville to visit petitioner's brother, then to Memphis for the duration of the trial. She testified that they had sex on this trip. Still the dominant purpose of this trip was defending a tax evasion indictment, not having sex with her.

Count 10 – Jane Doe #5, 2005, 30 year sentence: She and Jane Doe #4 traveled to California from Fouke to replace two others and work at the California church. The church required that all members travel at a minimum in pairs as enjoined in the Bible.[7] She testified she had sex with petitioner after getting to California.

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[6] *United States v. Hoffman*, 926 F.Supp. 659 (W.D. Tenn. 1996), *aff'd*, 124 F.3d 200 (Table), 1997 WL 476513 (6th Cir. 1997).

[7] LUKE 10:1 (KJV).

The jury convicted of all ten counts in July 2009. In November 2009, the District Court sentenced petitioner, now 76 years old, to 175 years imprisonment, giving him the maximum possible on each count[8] and making them consecutive.

3. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit arguing that the interstate commerce element for a Mann Act prosecution from *Mortensen v. United States,* 322 U.S. 369 (1944), that sex be the dominant purpose of the trip, was not satisfied.[9]

The Court of Appeals disagreed and affirmed. *United States v. Hoffman,* 626 F.3d 993 (8th Cir. 2010) (App. 1-13)

> In the instant case, viewing the evidence in the light most favorable to the verdict, Hoffman's intention that these girls engage in illegal sexual conduct was a dominant motive of their interstate travel. Even in the instances when Hoffman did not travel with the girls, the evidence supports the conclusion that he directed their return to Arkansas so that he could resume his sexual

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[8] Depending on the date of the offense, it varied in this case from a maximum of 10, then 15, then 30 years. Now it is life imprisonment.

[9] It was conceded by petitioner that the State of Arkansas could have prosecuted for any Arkansas offenses involving minors. Petitioner's Brief in Court of Appeals at 32. The Mann Act imports state law violations into the statute. *Id.*

> activity with them. This is not a case, warned of by the Court in *Mortensen* so many years ago, and hypothesized about by Hoffman, of an immoral person merely traveling from place to place indulging in illegal or immoral acts incidentally. *Mortensen,* 322 U.S. at 376. The evidence here clearly demonstrated that in each instance Hoffman directed the travel and transport of these girls across state lines for the purpose of engaging in proscribed sexual acts, thus supporting the jury's conviction on each and every charge. (626 F.3d at 996; App. 5-6)

That frames the issue: Assuming that petitioner was having an unlawful sexual relationship with a minor in Arkansas, and the minor takes a week-long trip to Oklahoma and was always coming back to Arkansas, where is the "dominant purpose" of the trip back to Arkansas being sex? How can one be charged with a Mann Act violation under these circumstances? Petitioner was, and he was convicted of numerous counts where there was a trip with no sex or a trip where sex was incidental to the real purpose of the trip. The jury had trouble with this, as they well should, based on their note which the district court declined to answer.[10]

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[10] *See* text accompanying Note 5, *supra.*

REASON FOR GRANTING THE PETITION

I. The decision of the Court of Appeals is contrary to the Commerce Clause requirement and *Mortensen v. United States* and that the "dominant purpose" of the trip in a Mann Act prosecution must be unlawful sex. The Court of Appeals unconstitutionally permits prosecution if sex ever happened, without regard to proof of purpose.

A. In this case, the Court of Appeals affirmed convictions for Mann Act counts even where there was no sex on a trip, essentially reducing the Mann Act to this: If you are in an unlawful sexual relationship, neither of the participants can cross a state line because, if sex occurs after a second state line crossing, returning to the starting point, it is a crime because that crossing somehow facilitates the relationship. This construction turns the Commerce Clause requirement of the Mann Act into a trigger, not an element of the crime subject to any meaning.

B. The Mann Act and its sex in interstate commerce requirement has not been the subject of substantive discussion by this Court for 65 years. The last was *Cleveland v. United States,* 329 U.S. 14, 20 (1946): "But guilt under the Mann Act turns on the purpose which motivates the transportation, not on its accomplishment. *Wilson v. United States, supra,* 232 U.S. [563,] at pages 570, 571 [(1914)]." This case involves the accomplishment of travel, not the purpose, and the interstate commerce element became incidental, virtually irrelevant.

The interstate commerce element of the Mann Act is not a formality – interstate commerce is an element of the crime and what creates federal jurisdiction for "'[s]tates possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (1995), quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Indeed, under the Mann Act, state crimes are imported into the federal statute as the elements *plus* interstate commerce and "dominant purpose."

In *Mortensen v. United States*, 322 U.S. 369, 374 (1944), this Court found the evidence of an interstate commerce link utterly lacking, in words applicable to most, if not all, of the counts against petitioner.

> Since the issue as to whether petitioners intended that the two girls should resume their immoral conduct on their return to Grand Island and transported them in interstate commerce for that purpose was submitted to the jury with appropriate instructions we would normally be precluded from reviewing or disturbing the inferences of fact drawn from the evidence by the jury. But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. *Cf. Abrams v. United States*, 250 U.S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly

> find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce 'for the purpose of prostitution or debauchery' within the meaning of the Mann Act.
>
> It may be assumed that petitioners anticipated that the two girls would resume their activities as prostitutes upon their return to Grand Island. But we do not think it is fair or permissible under the evidence adduced to infer that this interstate vacation trip, or any part of it, was undertaken by petitioners for the purpose of, or as a means of effecting or facilitating, such activities. The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls. It was a complete break or interlude in the operation of petitioners' house of ill fame and was entirely disassociated therefrom. There was no evidence that any immoral acts occurred on the journey or that petitioners forced the girls against their will to return to Grand Island for immoral purposes.

Mortensen, 322 U.S. at 374-75.

Similarly, in *Hansen v. Huff,* 291 U.S. 559, 563 (1934), the Court said: "Accordingly, it has been held that the transportation denounced must have for its object or be a means of effecting or facilitating the sexual intercourse of the participants. If the purpose of the journey is not sexual intercourse, though that be contemplated, the statute is not violated."

C. Under *Mortensen* and the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, none of the ten convictions against petitioner can stand because the government failed to prove the required interstate commerce connection and "dominant purpose."

Mortensen has apparently been undermined by most of the courts of appeals ever since it was decided. *See* DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT ch. 9 (1995).[11]

That is essentially what the Court of Appeals did here. Although the Court of Appeals cited *Mortensen* and seemed to uphold its validity (626 F.3d at 996; App. 5-6), it emasculated the "dominant purpose" test and made it essentially an "if travel happened any time during the 'relationship' or even as an afterthought" test.

D. The Court of Appeals' decision below also conflicts with *United States v. Broxmeyer*, 616 F.3d 120 (2d Cir. 2010), decided after the opening brief was filed, but relied upon at oral argument by a notice of supplemental authority.

Broxmeyer reversed a conviction for insufficiency of the evidence of dominant purpose, and is squarely contrary to the decision of the Court of Appeals. The Court of Appeals distinguished *Broxmeyer* (App. 6),

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[11] *Mortensen* was a 5-4 decision with a two paragraph dissent.

but unconvincingly, saying that petitioner's state of mind coincided with the trips here but Broxmeyer's did not.

The accused in *Broxmeyer* was a field hockey coach of girls' teams and he had ongoing relationships with several underage girls he coached. The sex on the out-of-state trip for the team in question was an afterthought, but it continued their relationship. Because sex was merely an afterthought to the purpose of the trip, Broxmeyer could not be convicted of that count. The availability of the girl for sex was irrelevant. In the Eighth Circuit, Broxmeyer's conviction would have been sustained merely because he arranged the trip that the girl was going on. *Broxmeyer* is faithful to *Mortensen,* but this case is not, and this is a conflict in the circuits.

E. After 65 years without any discussion from this Court, it is time to revisit the Mann Act and the Commerce Clause's "dominant purpose" requirement. Either *Mortensen* is still the law or it is not. If it is the law, these convictions must be reversed for insufficiency of the evidence on all or nearly all of the counts because the government failed to show the dominant purpose of the trip was sex.

If *Mortensen* is not the law or the Commerce Clause is just a trigger for prosecution without proof of purpose, then it is time for this court to say so and overrule it. The Court of Appeals here sustained counts where there was interstate travel with *no sex at all* during the trip, but there was testimony of a

sexual "relationship" between petitioner and some of the girls, essentially criminalizing any interstate trip without regard to whether sex occurred or was contemplated.

The outcome here just flies in the face of the Commerce Clause, and petitioner's convictions are unconstitutional under *Mortensen*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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626 F.3d 993

United States Court of Appeals
For the Eighth Circuit

No. 09-3651

United States of America,	*	
	*	
Appellee,	*	
	*	United States District
v.	*	Court for the Western
	*	District of Arkansas
Bernie Lazar Hoffman, also known as Tony Alamo,	*	
	*	
Appellant.	*	

Submitted: September 21, 2010
Filed: December 2, 2010

Before BYE, BEAM, and SMITH, Circuit Judges.

BEAM, Circuit Judge.

A jury found Bernie Lazar Hoffman, a/k/a Tony Alamo, guilty of ten counts of transporting five minor females across state lines for the purpose of engaging in illegal sexual activity in violation of the Mann Act,

18 U.S.C. §§ 2 and 2423. The district court[1] sentenced Hoffman to consecutive terms of imprisonment on all counts, for a total term of life imprisonment. Because there was sufficient evidence to support the verdict on each of the ten counts and the district court appropriately sentenced Hoffman under the United States Sentencing Guidelines (U.S.S.G. or Guidelines) and the Constitution, we affirm.

I. BACKGROUND

The government charged Hoffman with ten counts of violating the Mann Act for transporting minor females in interstate commerce with the intent to engage in criminal sexual activity. These charges followed an investigation conducted by the Federal Bureau of Investigation (FBI) into Hoffman's travel with certain young children between 1994 and 2005. The trial evidence in this case is voluminous and includes testimony from many people, including each of the five girls that Hoffman made his "wife," some even at the tender age of eight. We are not going to document the specific nefarious activities that occurred between these individuals and Hoffman. For purposes of the federal charges in play, it suffices that these girls testified that Hoffman engaged in illegal sexual contact with each of them either during or shortly following interstate travel

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[1] The Honorable Harry F. Barnes, United States District Judge for the Western District of Arkansas.

and that, regardless of whether Hoffman actually traveled with them, all their travel was taken under the direction of and under the control of Hoffman. In the instances where Hoffman did not travel with the girls, the testimony revealed that Hoffman, alone, determined the length of the trip and directed the girls when to return to Arkansas, where he engaged in sexual intercourse with each girl shortly upon her return.

At sentencing, the district court accurately conveyed that the imposed sentence was based upon an application of the Guidelines, which the court appropriately applied in an advisory fashion; information from the Presentence Report; trial testimony; arguments and objections by both sides. Further, the imposed sentence followed the submission of evidence in the form of testimony and letters at the sentencing hearing itself. The court sentenced Hoffman to life imprisonment. At one point during its colloquy, the district court stated:

> [h]opefully, this sentence, life imprisonment, will uphold the law and respect for the law and send a message to others that violation of children, young girls like these victims, shall not be and will not be tolerated in the courts around this United States of America. Mr. Alamo, one day you will face a higher and greater judge than me. May he have mercy on your soul.

Hoffman appeals, claiming that the evidence presented does not support the jury's verdict and that

the imposed sentence was tainted by the district court's personal sense of religion.

II. DISCUSSION

A. Sufficiency of the Evidence

This court reviews the sufficiency of the evidence presented at trial de novo, viewing the evidence in the light most favorable to the jury's verdict and drawing all reasonable inferences in the government's favor. *United States v. Coleman,* 584 F.3d 1121, 1125 (8th Cir. 2009), *cert. denied,* 130 S. Ct. 1752 (2010). We find that sufficient evidence exists to support Hoffman's conviction.

> [I]f after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The standard for determining the sufficiency of the evidence is strict, and a guilty verdict should not be lightly overturned. We view the evidence in a light most favorable to the verdict, giving the verdict the benefit of all reasonable inferences, and [we] will reverse only if the jury must have had a reasonable doubt concerning one of the essential elements of the crime.

United States v. Dugan, 238 F.3d 1041, 1043 (8th Cir. 2001) (second and third alterations in original) (internal quotations omitted).

The statutory antecedents of the current Mann Act were enacted to outlaw the use of interstate commerce as a calculated means for effectuating sexual immorality, and date back to the early part of the twentieth century. *Mortensen v. United States,* 322 U.S. 369, 375 (1944), *United States v. Vang,* 128 F.3d 1065, 1069 (7th Cir. 1997). Under its current version, § 2423(a) states:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense,[2] shall be fined under this title and imprisoned not less than 10 years or for life.

In the instant case, viewing the evidence in the light most favorable to the verdict, Hoffman's intention that these girls engage in illegal sexual conduct was a dominant motive of their interstate travel. Even in the instances when Hoffman did not travel with the girls, the evidence supports the conclusion that he directed their return to Arkansas so that he could resume his sexual activity with them. This is not a case, warned of by the Court in *Mortensen* so many years ago, and hypothesized about by Hoffman,

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[2] According to the government, Hoffman could have been charged with violating various Arkansas criminal statutes.

of an immoral person merely traveling from place to place indulging in illegal or immoral acts incidentally. *Mortensen,* 322 U.S. at 376. The evidence here clearly demonstrated that in each instance Hoffman directed the travel and transport of these girls across state lines for the purpose of engaging in proscribed sexual acts, thus supporting the jury's conviction on each and every charge.

In *United States v. Broxmeyer,* 616 F.3d 120 (2d Cir. 2010), a case relied upon by Hoffman at oral argument to bolster his argument that sex was merely incidental to these trips, the court reversed a § 2423(a) conviction because the *mens rea* of intent did not coincide with the actus reus of crossing state lines. 616 F.3d at 129. There, a hockey coach entered into a sexual relationship with a fifteen-year-old player. Relevant to the § 2423(a) violation, the coach drove the girl from New York to her home in Pennsylvania one Sunday following practice and had sex with her before leaving New York. On those facts, the actus reus and mens rea did not coincide. *Id.* at 127-30. Unlike *Broxmeyer,* however, the evidence in the instant case supports the jury's conclusion that at all times Hoffman's intent in transporting these girls across state lines was for the purpose of engaging in illegal sexual activity.

As to Hoffman's intent, we have held that "[t]he illicit behavior must be one of the purposes motivating . . . the interstate transportation [of the minor], but need not be the dominant purpose." *United States v. Cole,* 262 F.3d 704, 709 (8th Cir. 2001) (internal

quotation omitted). The sexual activity just may not be merely incidental to the trip. *Id.* Indeed, the jury instructions, which Hoffman does not challenge on appeal, accurately reflect the required determination. In particular, jury instruction 12 stated:

> It is not necessary for the government to prove that illicit sexual activity was the only, or sole, purpose for transporting the minor across state lines. However, the government must prove that sexual activity with the minor, which is prohibited by law, was a dominant motive of the travel. In determining whether the government has met its burden, you should keep in mind that a person may have several different motives or reasons for doing a particular act such as traveling and all such reasons may, in varying degrees, prompt the act.

It is the purpose for the transportation of the minor that is our focus under the Mann Act, not per se a defendant's reasons for travel generally. That a defendant facing charges under § 2423(a) need not have even traveled at all further supports this fact. In his brief, Hoffman views the standard through a different lens and argues, erroneously, that it requires proof that the illegal conduct was a "dominant purpose" of the trip, generally. He claims, that at best, sex was merely incidental to each of the out-of-state trips, and not a dominant purpose of the trip. Our focus, however, is on Hoffman's intent in having these girls transported across state lines.

Hoffman concedes that the proof is "admittedly stronger" as to certain of the ten convictions under the Mann Act in this case. But, Hoffman argues that there is no basis for a Mann Act conviction for others of these girls based upon the evidence presented. There were trips, he claims, where the record is "singularly devoid" of evidence of sex in relation to the trip at all, and all that the government proved was that Hoffman was having sex during that time period with that minor and that she took a trip. Additionally, despite Hoffman's arguments that the girls' return travel to Arkansas does not support Mann Act violations in this case, the return journey can be considered apart from its integral relation with the round trip as a whole, in the determination whether a violation of the Act has occurred.[3] *Mortensen*, 322 U.S. at 375. Indeed, we have held that the "illicit intent must [be] formed only before the conclusion of the interstate state [sic] journey." *Cole*, 262 F.3d at 708 (second alteration in original) (internal quotation omitted).

As one example of the failure of proof, Hoffman highlights the testimony of Jane Doe #3. Her testimony revealed that she became Hoffman's wife at the age of fourteen. Before Hoffman would consummate the marriage, however, he directed the girl to travel to Oklahoma so that she could placate her father, who

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[3] In this regard, we duly note the government's objections to the notations written by hand on the corrected page 7 of Appellant's Brief that was filed with the court on September 22, 2010.

had misgivings about her residing with Hoffman and had threatened to contact the FBI. Hoffman told Jane Doe #3 that he did not want to have sexual intercourse with her before the trip for fear that while in Oklahoma, someone might take her to a doctor and discover she was no longer a virgin. Jane Doe #3 was in Oklahoma until Hoffman directed that she return. Hoffman engaged in sexual intercourse with this girl the day she returned to Arkansas. Hoffman claims the evidence is sketchy, at best, regarding the Mann Act violation on these facts, especially since Jane Doe #3 traveled to be with her family and Hoffman did not accompany her. Yet, viewing the evidence in the light most favorable to the verdict, the evidence wholly belies this assertion and supports the conviction because Hoffman transported Jane Doe #3 from Oklahoma to Arkansas so that he could have sex with her.

In this case, the evidence amply supports the jury's determination that Hoffman intended to have sex with these girls and that he transported them across state lines for that purpose. In fact, the inference easily gleaned from the evidence is that there was no other purpose for the girls to be on the trip at all except to service Hoffman. It is disingenuous to suggest that Hoffman's intentions for these minor girls' transportation across state lines was for any purpose other than their sexual exploitation. He orchestrated and controlled their travel through interstate commerce so that they would be available to him to engage in illegal sexual relations.

Viewing the evidence in the light most favorable to the government, the jury's verdict that Hoffman knowingly transported these minors in interstate commerce with the intent to engage in sexual activity prohibited by law was reasonable. We therefore affirm the verdict.

B. Sentencing

Hoffman also argues that the district court's statement "Mr. Alamo, one day you will face a higher and greater judge than me. May he have mercy on your soul," demonstrates that the imposed sentence was impermissibly influenced by religious factors, which are irrelevant and should receive no weight. He bolsters this claim by further noting the court's acknowledgment that some of the victims were frightened into believing they risked a loss of their salvation if they didn't surrender, as well as the court's reference to Hoffman's abuse of power as the girls' pastor, a person of trust and supreme authority in Hoffman's church. Taking these statements together, claims Hoffman, there is no doubt the district court was predisposed to impose a harsh sentence given its own personal sense of religion, thus abusing its discretion under 18 U.S.C. § 3553(a) and violating due process.[4]

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[4] Although it appears that Hoffman equates an abuse of discretion under § 3553(a) with a violation of due process, nowhere does he expand upon this constitutional claim. As we

(Continued on following page)

We apply a deferential abuse-of-discretion standard in reviewing the imposition of sentences. *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009). We "first ensure that the district court committed no significant procedural error," which includes failing to calculate the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007). A district court abuses its discretion when it "(1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment." *Feemster*, 572 F.3d at 461 (quotation omitted). In the absence of procedural error below, we consider "'the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.'" *Id.* (quoting *Gall*, 552 U.S. at 51). If the defendant's sentence is within the Guidelines range, this court "may, but [is] not required to, apply a presumption of reasonableness." *Id.* (quotation omitted).

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have done in similar past circumstances, we decline to hold – as a matter that would be of first impression – that any procedural error at a criminal defendant's sentencing violates such defendant's due process rights. *United States v. Van Nguyen*, 602 F.3d 886, 894 n.7 (8th Cir.), *cert. denied, Nguyen v. United States*, 2010 WL 3184138 (U.S. Oct. 4, 2010) and *Nguyen v. United States*, 2010 WL 3074284 (U.S. Oct. 4, 2010).

There was no abuse of discretion here. Reviewing the entire sentencing transcript and placing these challenged comments by the district court in context, as we should, the district court based its sentence on its analysis of appropriate factors. The court's acknowledgment that Hoffman used his position of power over these girls in the commission of these crimes was most certainly reasonable, and in fact it is expected this would play a role in the court's analysis at sentencing. Further, the brief comment about a "higher and greater judge," and "[m]ay he have mercy on your soul," may be interpreted to be religious in nature but in no way does it appear to have been an inappropriate driving force or improper consideration during the court's sentencing of Hoffman. Indeed, religion was a pervasive theme underlying the entire trial. It is thus not surprising that religion might have been mentioned at sentencing.

Given the court's sentencing colloquy, the record reflects that the court appropriately based the sentence on the sum of the evidence in light of the advisory sentencing Guidelines and the court's analysis of the § 3553(a) factors. *But see United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (questioning, in a pre-Guidelines case, whether a judge's comment starting with "those of us who do have a religion" was proof of an impermissible use of religion in sentencing and reversing for resentencing out of an abundance of caution). Hoffman goes too far in characterizing these comments as proof that the sentencing court's own sense of religious propriety might have clouded its

imposition of sentence. Nothing suggests that the district court's personal view of religion in any way influenced an aspect of Hoffman's sentence. We have no "apprehension" here regarding the basis for the court's imposed sentence. *Id.* at 741. Accordingly, giving deference to the district court, we find no abuse of discretion.

III. CONCLUSION

For the reasons stated herein, we affirm.

United States Court of Appeals
For The Eighth Circuit

No: 09-3651

United States of America

Appellee

v.

Bernie Lazar Hoffman, also known as Tony Alamo

Appellant

Appeal from the United States District Court
for the Western District of Arkansas – Texarkana
(4:08-cr-40020-HFB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 09, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans